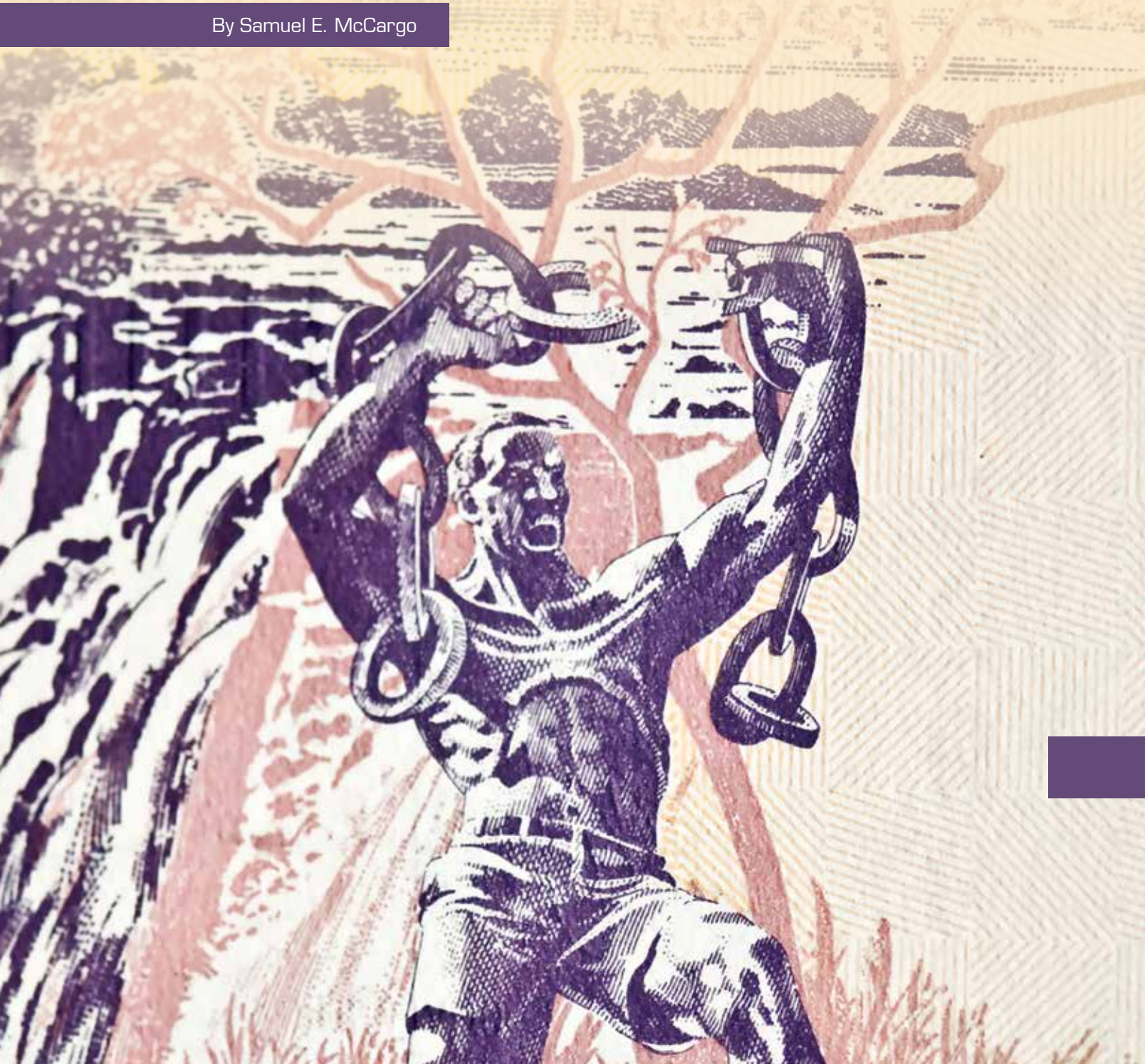


# Taney's Negroes Can the Court Un-Ring the Bell?

By Samuel E. McCargo



They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect . . . This opinion was at that time fixed and universal in the civilized portion of the white race. It was regarded as an axiom in morals as well as in politics, which no one thought of disputing, or supposed to be open to dispute; and men in every grade and position in society daily and habitually acted upon it in their private pursuits, as well as in matters of public concern, without doubting for a moment the correctness of this opinion.<sup>1</sup>

Just as the Liberty Bell rings throughout this land as “an iconic symbol of American independence,”<sup>2</sup> the words above of the United States Supreme Court rang and continue to ring an equally symbolic bell of perceived inferiority for Dred Scott and every American Negro, living, dead, and yet to be born! This judicial assembly of words targeted a single ethnic group—the American Negro. Chief Justice Roger Taney purported to speak for white “men in every grade and position in society.”<sup>3</sup> According to the Court, every American citizen was in one accord on the place of the Negro in society.

Notions of inferiority were burned into the hearts and minds of generations of Negroes; superiority in the hearts and minds of whites; and indifference in the hearts and minds of other American ethnic groups. This thread of perceived Negro inferiority was woven into the legacy of the American people, as a matter of law, by the words of the Supreme Court.

Taney’s 1856 opinion is, in no small measure, a significant contributor to the contemporary strife between blacks and whites. Our Supreme Court rang the bell and set in motion a level of racial tension that lingers and periodically explodes in our communities today. Countless institutions, groups, charities, and other well-intended segments of society have tried unsuccessfully to undo what the Supreme Court did in the *Dred Scott* case. But let there be no mistake: only the Supreme Court can un-ring its own bell. At this time, we must ask when, how, and in what manner can the Court un-ring the *Dred Scott* bell?

The Supreme Court’s dehumanizing words were revisited by Justice Thurgood Marshall in his concurring opinion in *Regents of University of California v Bakke*.<sup>4</sup> The Marshall opinion provides a roadmap for the true appreciation of the multifaceted power of Taney’s words.<sup>5</sup> In *Bakke*, Justice Marshall observed:

While I applaud the judgment of the Court that a university may consider race in its admissions process, it is more than a little ironic that, after several hundred years of class-based discrimination against Negroes, the Court is unwilling to hold that a class-based remedy for that discrimination is permissible. In declining to so hold, today’s judgment ignores the fact that for several hundred years Negroes have been discriminated against not as individuals, but rather solely because of the color of their skins. It is unnecessary in 20th-century America to have individual Negroes demonstrate that they have been victims of racial discrimination; the racism of our society has been so pervasive that none, regardless of wealth or position, has managed to escape its impact. The experience of Negroes in America has been different in kind, not just in degree, from that of other ethnic groups. It is not merely the history of slavery alone but also that a whole people were marked as inferior by the law. And that mark has endured. The dream of America as the great melting pot has not been realized for the Negro; because of his skin color he never even made it into the pot.<sup>6</sup>

## FAST FACTS

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It is unlikely that another case similar to *Dred Scott* will return to the Supreme Court, so there will be no single opportunity to erase Taney’s mark.

No other ethnic group in America has been marked by the law—through the words of the Supreme Court—as an inferior people except Negroes. This hideous mark of inferiority has endured, and it has condemned this nation to a social, political, and economic divide that separates blacks from whites and all other ethnic groups.

Between Justice Marshall's 1978 opinion and the date of this article's publication, freeing blacks from Taney's mark has never been an interest of the highest order in this country; as Justice Marshall predicted, America has been and remains to this day "a divided society."<sup>7</sup> The division exists in the highest and lowest segments of our society. Taney's Negroes, then and now, were described, perceived, and treated as inferior beings: "and men in every grade and position in society daily and habitually acted upon it in their private pursuits, as well as in matters of public concern, without doubting for a moment the correctness of this opinion."<sup>8</sup>

Justice Marshall called on the nation to commemorate that the voice of the Supreme Court validated and legalized this degradation of Negroes and repeatedly seized on opportunities to frustrate the progress and protections of blacks:

Reconstruction came to a close, and, with the assistance of this Court, the Negro was rapidly stripped of his new civil rights. In the words of C. Vann Woodward: "By narrow and ingenious interpretation [the Supreme Court's] decisions over a period of years had whittled away a great part of the authority presumably given the government for protection of civil rights." Woodward 139.

The Court began by interpreting the Civil War Amendments in a manner that sharply curtailed their substantive protections. See, e.g., *Slaughter-House Cases*, *supra*; *United States v. Reese*, 92 U.S. 214 (1876); *United States v. Cruikshank*, 92 U.S. 542, 23 L Ed 588 (1876). Then in the notorious *Civil Rights Cases*, 109 U.S. 3; 3 S. Ct. 18, 27 L Ed 835 (1883), the Court strangled Congress' efforts to use its power to promote racial equality. In those cases the Court invalidated sections of the Civil Rights Act of 1875 that made it a crime to deny equal

access to "inns, public conveyances, theatres and other places of public amusement." *Id.* at 10, 3 S. Ct., at 20. According to the Court, the Fourteenth Amendment gave Congress the power to proscribe only discriminatory action by the State. The Court ruled that the Negroes who were excluded from public places suffered only an invasion of their social rights at the hands of private individuals, and Congress had no power to remedy that.<sup>9</sup>

Today we are forced to ask if Taney's appraisal of Negroes as an "inferior order" played any role in these recent deaths: the Trayvon Martin shooting in Florida by a mixed-race security guard; the killing of Michael Brown by a white police officer in Ferguson, Missouri; the shooting of Renisha McBride, a black female seeking help after an auto accident, by a white homeowner in Dearborn Heights, Michigan; the Oscar Grant III shooting by a white BART police officer in Oakland, California; the shooting of Jordan Davis by a white man at a Jacksonville, Florida gas station because of the music playing in his car; and the strangulation of Eric Garner at the hands of a white police officer as Garner was being taken into police custody in Staten Island, New York.

We ask, Was Justice Marshall right? Does our nation still embrace these tragic "invasions of the social rights" of blacks? Are we still living in a society that relegates blacks to a status of racial inferiority?

Barack Obama's ascent to the presidency in 2008 gave hope to many blacks that Taney's words were dead. Progressive and genuinely compassionate whites were relieved that, maybe, the nation had turned the corner and turned its back on Taney's description of the soul of America. Unfortunately, as Taney noted, lawmakers "impressed such deep and enduring marks of inferiority and degradation" on blacks that even the confines of the White House cannot insulate President Obama and his family from public disrespect that no white president has ever experienced. The exactitude of Justice Marshall's observations are manifest in how this nation, in a variety of segments of society, has treated the first black president

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of the United States. Among myriad examples, here are but a few:

- In 2014, Evelyn Lauten, the communications director for Rep. Stephen Fincher, R-Tenn., published a Facebook posting degrading President Obama's teenage daughters, Sasha and Malia. In a Facebook post, Lauten wrote: "Dear Sasha and Malia, . . . I get you're both in those awful teen years, but you're a part of the first family, try showing a little class. At least respect the part you play. Then again your mother and father don't respect their positions very much, or the nation for that matter, so I'm guessing you're coming up a little short in the 'good role model' department." Lauten went further in her degradation of the girls and provided these instructions: "Rise to the occasion. Act like being in the White House matters to you. Dress like you deserve respect, not a spot at a bar."
- In September 2009, Rep. Joe Wilson, R-S.C., interrupted President Obama's speech to a joint session of Congress and shouted, "You lie!" as Obama was assuring Americans that affordable care legislation would not mandate coverage for undocumented immigrants.
- In 2011, Marilyn Davenport, a member of the Orange County (Calif.) GOP central committee, sent an e-mail message that included Obama's

face superimposed on a chimpanzee. In the e-mail, Obama was depicted as a chimpanzee with two older chimpanzees "as his parents." She also included a tag line: "Now you know why—no birth certificate!"

- In 2009, an aide to South Carolina Attorney General Henry McMaster described an escape of a gorilla from Columbia's Riverbanks Zoo, prompting GOP activist Rusty DePass to declare, "I'm sure it's just one of Michelle's (Obama's) ancestors—probably harmless."
- Rep. Jim Sensenbrenner, R-Wis., repeatedly attacked and demeaned Michelle Obama's "Let's Move" healthy-eating campaign; during a phone conversation, he was overheard saying, "She lectures us on eating right while she has a large posterior herself."

That Barack Obama was elected president of the United States on two separate occasions is a monumental achievement of historic proportions. Nevertheless, the shameful treatment he has tolerated while occupying the nation's highest office is a sad reminder of the lingering effects of Taney's mark. Contrary to the hopes of blacks in America, Obama's election has not eradicated the mark of inferiority; instead, it has torn the cover from the entrenched Supreme Court typecasting of the American Negro in 1856. These distasteful manifestations of



deep-seated notions of black inferiority, coupled with historical court-sanctioned Jim Crow principles, are sadly alive and well.

Taney's 1856 mark on Negroes now manifests itself as a mark of "second-class citizenship." Even President Obama and his family carry it with them while occupying the White House. The public mistreatment of President Obama reminds us that blacks have not yet moved "from a position of legal inferiority to one of equality." As long as this nation holds its foot on the neck of the Negro—justified by the haunting words of the 1856 Taney opinion in *Dred Scott*—there can be no end to racism against blacks in America.

These variant tragedies in the everyday lives of Americans are inevitable and perpetual because the Court has utterly failed to unequivocally erase the mark. The truth is that the Court has too often wavered over the legal obligations it owes blacks in response to the grave injustice of the *Dred Scott* Court. Only one race has been subjugated to racial discrimination by the Supreme Court. As Taney explained, "the court must be understood as speaking in this opinion of that class only, that is, of those persons who are the descendants of Africans who were imported into this country, and sold as slaves."<sup>10</sup>

Blacks have been forced to endure significant differences in treatment and experiences in this country; and until the nation, and particularly the Court, accepts and acknowledges the need for a color-conscious response to the Court's legal validation of "inferior" status for blacks in America,<sup>11</sup> the race question can never go away. Justice Marshall explained the problem thusly:

These differences in the experience of the Negro make it difficult for me to accept that Negroes cannot be afforded greater protection under the Fourteenth Amendment where it is necessary to remedy the effects of past discrimination. In the *Civil Rights Cases*, *supra*, the Court wrote that the Negro emerging from slavery must cease "to be the special favorite of the laws." 109 U.S., at 25, 3 S. Ct., at 31, see *supra* at 2800. We cannot in light of the history of the last century yield to that view....

Most importantly, had the Court been willing in 1896, in *Plessy v. Ferguson*, to hold that the Equal Protection Clause forbids differences in treatment based on race, we would not be faced with this dilemma in 1978. We must remember, however, that the principle that the "Constitution is color-blind" appeared only in the opinion of the lone dissenter. 163 U.S., at 559, 16 S. Ct., at 1146. The majority of the Court rejected the principle of color-blindness, and for the next 58 years, from *Plessy* to *Brown v. Board of Education*, ours was a Nation where, *by law*, an individual could be given "special" treatment based on the color of his skin.<sup>12</sup>

It is unlikely that another Negro slave case like *Dred Scott* will return to the Supreme Court, so there will be no single opportunity to erase Taney's mark. Instead, like the spread of cancer, the mark of Negro inferiority has been dispersed through a broad and complex web of societal and political networks of oppression and repression and created intimidating judicial "problems of considerable complexity."<sup>13</sup> It appears that this complexity has had a chilling effect on the Court, and it has refused to stand face to face with its own history of wrongdoing against Negroes in America. This is the Court's real challenge; and until this challenge is accepted and the wrongdoing corrected, there can be no end to the racial isolation of blacks in America. As noted by Justice Marshall, "bringing the Negro into the mainstream of American life should be a state interest of the highest order;"<sup>14</sup> the Court must embrace and reaffirm this judicial concept in every case in which the history of the Court's treatment of the American Negro, directly or indirectly, finds its way to the Court's docket.

Only the Court can un-ring this unique bell of perceived Negro inferiority—and it has yet to do so. ■



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## ENDNOTES

1. *Scott v Sandford*, 60 US 393, 407; 15 L Ed 691 (1856) (Chief Justice Taney delivering the Court's opinion).
2. Wikipedia, *Liberty Bell* <[http://en.wikipedia.org/wiki/Liberty\\_Bell](http://en.wikipedia.org/wiki/Liberty_Bell)> (accessed April 8, 2015).
3. *Scott*, 60 US at 407.
4. *Regents of Univ of California v Bakke*, 438 US 265; 98 S Ct 2733; 57 L Ed 2d 750 (1978).
5. And those of six additional justices of the *Dred Scott* Court who joined in the opinion.
6. *Regents*, 438 US at 400–401.
7. *Id.* at 396.
8. *Scott*, 60 US at 407.
9. *Regents*, 438 US at 391.
10. *Scott*, 60 US at 403.
11. See, e.g., *Cumming v Richmond Co Bd of Ed*, 175 US 528, 545; 20 S Ct 197; 44 L Ed 262 (1899).
12. *Regents*, 438 US at 401.
13. *Brown v Bd of Ed*, 347 US 483, 495; 74 S Ct 686; 98 L Ed 873 (1954).
14. *Regents*, 438 US at 396.